

**From Cyber Bullying
to Cell Phones:
Navigating through the Legal Questions and Answers**

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Powerpoint and video (audio) available at
<http://www.nsba.org/SecondaryMenu/NationalAffiliates/Webinars/Cyberbullying.aspx>

Overview

- λ Cyberbullying, student online expression
- λ Cell phone issues
- λ Some additional resources
 - What info is best for whom?

Student expression & technology

- λ Concerns over student expression not new
- λ Telecommunications revolution
- λ Student web publishing
 - Law
 - Concerns
 - Some news & court decisions
 - Practical considerations for school officials

Student speech

- λ *Tinker v. Des Moines Ind. Comm. Sch. Dist.* (1969)
 - “Material and substantial disruption”
 - λ Or reasonable forecast thereof
 - “Impinge upon the rights of others”
- λ Different exceptions for:
 - Lewd or vulgar speech
 - School-sponsored speech

Off-campus speech

- λ “True threat” not protected by 1st Am.

- *Watts v. U.S.* (1969) (true threat on President)
- Lower court tests for “true threat” vary:
How reasonable person would perceive statement, was it communicated to someone else, was it stated conditionally, etc.?
- λ If NOT true threat, *Tinker* disruption test?
 - Some courts give schools more latitude
 - BUT, still good point of reference

Most recent case

- Morse v. Frederick* (U.S. S. Ct. 2007):
- λ “Bong Hits 4 Jesus!” not “plainly offensive,” no disruption
 - λ Ct:
 1. Can restrict drug message
 2. This was not “off-campus” speech
 3. *Tinker* not the only test
 4. Principal not personally liable
 - λ Watch how lower courts apply this case!

Social Networking

- λ Profiles: 61% of teenagers have one!
- λ POWERFUL PLATFORMS
- λ Today’s example: **MySpace**:
 - Over 200 million members?
 - #1 in page views

Threats & warning signs

- λ One of the lessons of school shootings:
Warning signs were there
- λ Schools got that message – headlines
- λ Polling question: Monitoring?
- λ *Latour v. Riverside Beaver Sch. Dist.* (W.D. Pa. 2005):
 - Ct.: Student’s violent lyrics not true threat
 - No evidence of threat
 - **KEY point**: No evidence district took other action consistent with concern that lyrics were true threat
- λ *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, (2d Cir. 2007)
 - IM: “Kill Mr. VanderMolen”
 - Students had been warned about threats
 - Hearing officer: Semester suspension
 - District ct: “True threat”
 - Appeals ct: “Reasonably foreseeable disruption”
 - λ **NOTE**: “Excessive punishment not raised”
- λ *Boim v. Fulton County Sch. Dist.*, (11th Cir. 2007) – essay in notebook at school
 - Foreseeable disruption, airport analogy

— Cites *Morse v. Frederick!*

λ **Note:** Other courts have too!

— **Note:** School board rejected expulsion

λ Hypothetical: MySpace off campus?

Material & substantial disruption

λ *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield* (7th Cir. 1998):

— Article about how to hack into district's computer system

— Ct.: Disruption reasonably foreseeable

λ *Neal v. Efur* (W.D. Ark. 2005)

— Website demeans athletes, band, admin.

— Parent complains, quick reaction

— Ct.: No threat = no disruption

Online safety

λ By some estimates:

— 50,000 sexual predators online at any moment

— 89% of sexual solicitations occur in chatrooms and instant messages

— 1 in 5 children has been solicited for sex

— 25% of those solicited never tell a parent

λ Easy to deduce lots from a little info

λ 2007 NSBA report:

— *Creating and Connecting: Research and Guidelines on Online Social – and Educational – Networking*

λ Available at <http://www.nsba.org>

λ Adults fear more than students report?

— Many districts prohibit access

— But low percentages of huge numbers?

λ Legislation, federal & state, AGs' deals

Cyberbullying

λ Advocates:

— Cyberbullying pervasive

— Calls for every district to adopt policy

λ In other contexts, deliberate indifference to bullying or harassment invites liability

λ But off-campus?

λ State laws passed

— Are they more restrictive?

λ *Coy v. Bd. of Ed. of North Canton City Schools* (N.D. Ohio 2002)

— Site insults “loser” classmates

— Ct.: Would be unconstitutional if school imposed discipline just because officials disliked content

— Unusual: Even on school equipment!

Principal profile

Disrespect for school, personnel

Distinct from threats – 3 flavors:

1. Statement about school, personnel
2. Spoof or parody
3. Impersonation, false online profile

Disrespect - court cases

λ First flavor

λ *Beussink v. Woodland R-IV Sch. Dist.*, (E.D. Mo. 1998):

- Critical website encouraged readers to voice opinions to principal
- Ct.: No disruption – provocative speech most in need of protection

λ Second flavor

λ *J.S. v. Bethlehem Area Sch. Dist.*

(Pa. Cmwlth. 2000):

- Website about teacher: “Why She Should Die,” solicited contributions for hit man, graphic imagery
- Ct.: Substantial disruption where teacher so upset she had to take leave

Layshock v. Hermitage Sch. Dist Round II

(W.D. Pa. 2007): false profile, suggestive

λ Ct.: School discretion over off-campus speech limited – look to *Tinker*

- Nexus to school?
- Weak link to disruption – 3 other profiles!
- Disruption not substantial enough
- “Buzz” might have resulted from officials’ own actions

Disrespect

Requa v. Kent Sch. Dist (W.D. Wash. 2007):

λ Students secretly videotape teacher, post insulting video on YouTube & Myspace

λ School board:

- Violated sexual harassment policy –includes conduct that creates hostile environment
- Handbook prohibits use at school of personal electronic devices
- *Conduct* punished here, *not* speech

λ Ct: Not pretextual – no demand to pull video!

Disrespect for school, personnel

λ Third flavor

λ Criminal conduct?:

- Conn., Ind.: Impersonation charges
- Texas: Felony identity theft

λ School discipline for impersonating school personnel?

- More leeway than other scenarios?

— Note: Obvious parody or not?

Employee takes own action

- λ *J.S. v. Bethlehem* – In separate action from school case, teacher sued student!
 - Won \$500,000 for defamation & invasion of privacy
- λ Assistant principal in Texas sued students & parents for defamation, negligent supervision, etc.
 - Last I heard not going so well
 - Parents sued teacher who notice profile!

Evidence of other misconduct

- λ Connection to school?
- λ Criminal activity may be reachable
- λ Extracurricular/athlete code of conduct
 - Illinois district: Sign pledge not to post inappropriate content
- λ Issue: What consequence?

BUT consider...

Role of public schools

- λ This is part of today's youth culture
- λ National Center on Education Statistics, Sept. 2006:
 - Public schools are the Great Equalizer
 - 1 in 5 students accesses Internet at only one location. Of these:
 - λ 60% of children in poverty do so at school
 - λ 63% of children of non-high school graduates do so at school
 - Think E-Rate

Practical considerations

- λ School / district policies clear?
- λ Acceptable Use Policy: school equipment
- λ State statutory requirements checked?
 - Restrictive? Tex., Wash.
- λ School personnel trained in policy?
- λ Tradeoff between asserting authority and assuming liability?
- λ *Drews v. Joint Sch. Dist. No. 393*, (D. Idaho 2005)
 - Student sued district for failure to intervene when classmates posted info about her
 - Dismissed, but...
- λ Sometimes best to ignore?
 - It's all about attention?
- λ Conduct at issue, not just expression?
 - Impersonation
 - Illicit recording
 - Sexual harassment

Alternatives to disciplinary actions?

- λ Suspensions & expulsions may be justified, but constitutional implications
 - WHY?
 - **Think AYP!**
- λ Talk to offending students
- λ Contact parents of alleged transgressor
- λ Investigative intervention (as opposed to disciplinary)
- λ Contact social networking site
 - May have way for school to contact, like MySpace administrator's guide
 - Cyberbullying not allowed
 - No impersonating others
 - No one under 14 -- easy way if an issue
 - Goal is respond in 24 hours
- λ Make sure alleged victim knows options
- λ Educate students & parents
 - Safety tips, practical advice
 - How to use the sites' own features
 - "English teachers and Airports"
 - Warnings about potential liability, including criminal
 - Think about employers, colleges

Cell phones, etc.

- λ Historical ebbs and flows – pagers
 - Distraction
 - Cheating: Think "The Departed"
 - Cameras
- λ **ISSUE:** Admin. burden of policies
Price v. NYC Bd. of Ed. (NY ct, May 2007)
- λ District bans phones - Parents sue:
 - State statute: No rational purpose?
 - Constitutional right to raise child
 - λ Think about implications!
 - Could be less restrictive
- λ Ct.: Rational policy, and no "constitutional right to bear cell phones"
- λ ON APPEAL - oral arguments heard
- λ Issue: Consequence for violation?
- λ Confiscation?
 - Permanent?
 - For how long a period?
 - A "taking"? Interference with contract? Fine or civil penalty?
 - Some state laws may allow! Tex.
- λ Suspension?

λ *Laney v. Farley* (6th Cir. 2007)

- Student gets one-day in-school suspension, phone held for 30 days
- Parents sue for \$800,000
- Lower ct: Both penalties OK
- Appeals ct: In-school suspension does not raise same due process issues as out-of-school suspension

λ Again, legal implications of consequence, but also academic

λ Popular option: Parent or guardian has to retrieve confiscated phone

λ Another option: Escalating consequences

- Ill. Assn of School Boards model
- Warning, parent retrieval, confiscation, suspension, etc.

λ Again, some districts have decided outright ban is easiest to administer

λ **Searches of cell phones?**

λ Fourth Amendment

- Unreasonable search and seizure
- “This is school, not Law & Order”

λ *New Jersey v. TLO*, (U.S. S.Ct. 1985)

- Adult world: probable cause
- School: reasonable suspicion
- Balance legitimate expectation of privacy with school interest in discipline

λ Reasonableness test:

1. Search justified at its inception:

- Reasonable reason to suspect search will find evidence student violated law or school rule

2. Reasonably related in scope to circumstances that justified search:

- Means reasonably related to objective
- Not excessively intrusive given age & gender of student, nature of infraction

λ Criminal law cases still developing

λ *Klump v. Nazareth Area Sch. Dist.* (E.D. Penn. 2006)

- Ct.: Unconstitutional search
- Checking of voicemail violated state wiretapping law!
λ ISSUE: Where information stored?
- Case settled for nominal amount

λ Boulder, Colo.: ACLU protests searches

- District setting guidelines for staff
- Will discuss with ACLU

λ Factors to consider:

- Range of information on today’s devices
- Policy and notice about expectation of privacy – like lockers
- Examples for staff

λ **Scenario**

λ ADHD student has \$400 phone with calendar function -- school forbids use of cell phone

during school hours

λ Considerations:

- IDEA / Section 504: In IEP / 504 plan?
- Policy re. PEDs? Some flexibility for school administrator?
- Here: set expectations w/ student, parent

Other resources

λ NSBA's Technology Leadership Network

- From <http://www.nsba.org>

λ NSBA School Law Issues website pages

- <http://www.nsba.org/schoollaw>
- Click on School Law Issues, Technology

λ NSBA's free *Legal Clips* service

- <http://www.nsba.org/legalclips>

λ NSBA Council of School Attorneys

- <http://www.nsba.org/cosa> — eDoc store

λ **Your state school boards association**

- Policy services

λ Your school attorney

- Member of NSBA Council of School Attorneys?

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- Especially if I didn't get to questions this evening

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